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No. 97-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNAMETAL, INC.,
Petitioner,

v.

COMMISSIONER OF REVENUE
OF MASSACHUSETTS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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Question Presented

Whether the Massachusetts Supreme Judicial Court correctly concluded that technical assistance and other services rendered by a Pennsylvania manufacturer to its customers in Massachusetts exceeded the activities protected from state taxation by P.L. 86-272, 15 U.S.C. § 381 (1994).

Parties

The petition correctly describes the parties to this case.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to U.S. Supreme Court Rule 15, respondent Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Kennametal, Inc.

OPINIONS BELOW

The opinions below are correctly cited in the petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the judgment of the Massachusetts Supreme Judicial Court under 28 U.S.C. § 1257 (a). The petition was docketed on January 27, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition correctly describes the constitutional and statutory provisions involved in this case. *See* Pet. App. 37a-42a.

STATEMENT OF THE CASE

An accurate statement of the case appears in the decisions of the Massachusetts Appellate Tax Board ("the Board") and the Massachusetts Supreme Judicial Court. *See* Pet. App. 3a-11a and 24a-27a.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Supreme Court Rule 10. The Court will grant such a writ "only for compelling reasons." *Id.* The purpose of certiorari jurisdiction is to permit the Court to select cases "of such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892). Accordingly, a "petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10.

Kennametal claims that the decision below conflicts with one decision of this Court: *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992). For the reasons stated in this opposition, the decision below is consistent with *Wrigley* and, in any event, the petition does not satisfy the criteria that guide the Court's discretionary review. The petition should therefore be denied.

I. THE SUPREME JUDICIAL COURT CORRECTLY APPLIED *WRIGLEY* TO THE TECHNICALASSISTANCE PROVIDED BY KENNAMETAL TO ITS CUSTOMERS IN MASSACHUSETTS.

United States Supreme Court Rule 10(c) provides that the Court may consider certiorari review when a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions

of this Court." These factors are absent here because the decision of the Supreme Judicial Court follows directly from *Wrigley's* application of P.L. 86-272.

A. *Public Law 86-272 Does Not Protect Technical Assistance that Serves a Business Function Independent of the Solicitation of Orders.*

Massachusetts General Laws Ann. c. 63, § 39 (West 1997 Supp.) imposes an excise on "every foreign corporation . . . actually doing business in the commonwealth. . . ." *Id.* The purpose of Section 39 is "to require the payment of th[e] excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation." *Id.* The net income of a corporation doing business in and outside Massachusetts is apportioned to Massachusetts by use of a three-factor formula set forth in M.G.L.A. c. 63, § 38 (West 1988 and 1997 Supp.).

Kennametal does not dispute that it was doing business in Massachusetts within the meaning of Section 39, or that there was a sufficient nexus between Kennametal and Massachusetts to support a tax under the Due Process and Commerce clauses. *See* Pet. App. 30a; *Quill Corp. v. North Dakota*, 504 U.S. 298, 305-313 (1992). Therefore, the only question presented by the petition is whether P.L. 86-272 protected Kennametal from the Massachusetts tax.

Public Law 86-272 provides in relevant part:

> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year

> ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such persons during such taxable year are either, or both of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside this State; and
>
> (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

15 U.S.C. § 381 (1994), codifying P.L. 86-272, § 101, 73 Stat. 555 (1959).

Public Law 86-272 was enacted in response to concerns expressed by businesses after the decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959). *Northwestern States* held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." *Id.* at 452. The decision called into question the previously settled view that a State could not tax a foreign corporation on the basis solely of solicitation

of orders for the sale of their products. *See* S. Rep. No. 658, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Admin. News at 2549-51.

Public Law 86-272 "prohibits a State from taxing the income of a corporation whose only business activities within the State consist of the 'solicitation of orders' for tangible goods, provided that the orders are sent outside the State for approval and the goods are delivered from out-of-state." *Wrigley*, 505 U.S. at 216. The statute does not define the term "solicitation of orders." In its only application of the term, the Court in *Wrigley* acknowledged that the solicitation of orders "covers more than what is strictly essential to making requests for purchases" but drew a "clear line . . . between those activities that are *entirely ancillary* to requests for purchases -- those that serve no independent business function apart from their connection to the soliciting of orders -- and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id.* at 228-29 (emphasis in original)(footnote and citation omitted). Under this test, "[p]roviding a car and a stock of free samples to a salesman is part of the 'solicitation of orders,'" because it serves no purpose other than "to facilitate requests for purchases." *Id.* at 229. In contrast,

> employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen.

Id. (footnote and citation omitted)(emphasis in original). The Court rejected as too broad the argument of the taxpayer that the term "solicitation of orders" includes any activities "routinely associated with" or "customarily performed by salesmen." *Id.* at 227-28. The Court rejected this approach because it "converts a standard embracing only a particular activity ('solicitation') into a standard embracing all activities routinely conducted by those who engage in that particular activity ('salesmen')." *Id.* at 227.

Wrigley also addressed in a footnote the question of technical assistance to customers. *Id.* at 224 n.2 (citing *Clairol, Inc. v. Kingsley*, 262 A.2d 213 (N.J. Super. App.), *aff'd*, 270 A.2d 702 (N.J. 1970), *app. dism'd*, 402 U.S. 902 (1971)). *Clairol* had considered the activities of two types of representatives of a beauty products company. 262 A.2d at 217. The first type visited retailers, reviewed Clairol product displays, gave free samples, and made suggestions for orders. *Id.* The second type visited salons and instructed beauticians on how to use Clairol products after purchase. *Id.* The New Jersey court upheld the tax. 262 A.2d at 217-18. The Court in *Wrigley* stated that, whether or not *Clairol* applied the correct standard under P.L. 86-272, the judgment of the New Jersey court "would have been the same" under the *Wrigley* test, "since the company's in-state activities included sending non-sales representatives *to provide customers technical assistance in the use of Clairol products*." 505 U.S. at 224 n. 2 (emphasis added).

Thus, *Wrigley* establishes that (1) activities are protected only if they are entirely ancillary to the solicitation of orders, and (2) technical assistance and similar activities are not protected if they serve an independent business function.

B. *The Activities of Kennametal in Massachusetts Exceeded the Activities Protected by P.L. 86-272.*

The record below amply supported the conclusions of the Board and the Supreme Judicial Court that the activities of Kennametal personnel in Massachusetts exceeded the activities protected by P.L. 86-272. The record showed that Kennametal field personnel (1) created "Tool Performance Reports" and other means to improve customer productivity; (2) provided inventory management and control services known as "Consultant Tool Management" or "Standardization"; (3) gave technical advice and in-plant training in the use of Kennametal products; and (4) resolved customer complaints, sometimes with personnel sent from outside Massachusetts. *See* Pet. App. 4a-11a, 25a-27a.

The Board found that "[t]o the extent it is a finding of fact, . . . the[se] activities of Kennametal employees served an independent business function and were not entirely ancillary to the solicitation of orders." Pet. App. 11a. The Board further found that, "[a]lthough such technical advice and studies may help to increase purchases, they are not ancillary to requesting purchases since there is an independent business reason to provide advice on the proper use of its product regardless of whether Kennametal had a sales force." *Id.*

The Supreme Judicial Court applied *Wrigley* to the facts found by the Board and affirmed. The court stated that the company "had reasons independent of soliciting orders that motivated it to provide the activities in question . . . . For example, the proper use of [the company's] products improves performance and enhances the company's reputation among

buyers." Pet. App. 34a. The court concluded that these activities "cannot be viewed as entirely ancillary to requests for purchase, but rather as serving an independent business function as well." *Id.* Accordingly, the Court held that the Board "reasonably could conclude that presentations made in front of 200 employees were primarily intended, generally, to increase sales rather than directly to facilitate the solicitation of orders." *Id.* at 36a.

These conclusions correctly applied *Wrigley* to the facts found by the Board. "To treat such servicing and teaching operations, although they will, of course, affect future orders, as a mere 'incident' to solicitation, is to stretch that term beyond its normally understood scope." J. & W. Hellerstein, *State Taxation* ¶ 6.13[1][c], p. 6-42 (1992)(discussing *Wrigley* and *Clairol*, *supra*). Because the court below correctly applied *Wrigley*, there is no basis for a claim that the state court "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Supreme Court Rule 10(c).[1]

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[1] Kennametal argues that the Supreme Judicial Court erred by describing unprotected activities as including those intended "to ingratiate customers and to assist buyers in knowing what to order." *See* Pet. 10, 14, 18-21; Pet. App. 34a. There is no conflict between this isolated statement and *Wrigley* because the Supreme Judicial Court plainly applied the crucial "independent business function" test applied in *Wrigley*. In some circumstances, solicitation may include certain "ingratiating" conduct, but that does not mean that the court below could not use the same term to describe one of the *purposes* of the technical assistance provided by Kennametal -- assistance that plainly exceeded solicitation. *Cf. Chevron U.S.A. v. Natural*

Moreover, the decisions below are supported by application of the even more protective standard set forth in the *Wrigley* dissent. The dissent rejected the rule applied by the majority on the ground that such a rule "condemns business activities that are bound to solicitation and do not possess *independent value* to the customer apart from what often accompanies a successful solicitation." 505 U.S. at 246 (emphasis added). According to the dissent, the activities of the *Wrigley* personnel were "not activities that can be said to have provided their own component of *significant value*." *Id.* (emphasis added).

Kennametal knows a good deal about adding value to a product. Its 1989 annual report stated:

> We are building on Kennametal's success by "adding value" to our products. Every time customers open a Kennametal package, they get more than the product; they gain access to all of Kennametal's global resources. Our technically knowledgeable direct sales force, our ongoing investment in research and development, and our advanced customer service systems are elements of the "something extra" customers get when they buy from Kennametal.

Board Jt. Ex. YY-14 at 5. The decisions below reasonably held Kennametal to the tax consequences of these claims.

At most, the petition presents only an alleged "misapplication of a properly stated rule of law." U.S. Supreme Court Rule 10. Indeed, Kennametal concedes that the "determination of whether an activity is entirely ancillary to

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Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)(Court "reviews judgments, not opinions").

requests for purchases is made by considering the facts and circumstances in each case" (Pet. 13), and argues that the "Massachusetts court *misapplied* [the *Wrigley*] analysis in reaching a decision contrary to the letter and spirit of . . . *Wrigley*." Pet. 11 (emphasis added). A petition resting on these grounds is "rarely granted," (U.S. Supreme Court Rule 10), and should not be granted here.

II. THE PETITION FAILS TO SHOW A CONFLICT IN THE COURTS BELOW OR PRESENT AN ISSUE OF NATIONAL IMPORTANCE THAT MERITS REVIEW BY THIS COURT.

Kennametal does not claim that the Supreme Judicial Court "has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Supreme Court Rule 10(b). In fact, the decision below is consistent with the overwhelming majority of state decisions before and after *Wrigley* that have addressed the issue of technical assistance.

In *Muro Pharmaceutical, Inc. v. Crystal*, 1994 WL 395266, *5 (Conn. Super. 1994), for example, the court construed *Wrigley's* citation to *Clairol* to mean that the Court "was plainly focusing on the more technical type of representative who told beauticians how to use Clairol products." *Id.* (P.L. 86-272 forecloses tax where drug sales representatives merely gave doctors description of product and copies of articles in medical journals). Similarly, in *BOC, Inc. v. Revenue Division, Dept. of Treasury*, 1993 WL 39624 (Mich. Ct. Cl.), the court held that sales representatives who held training sessions for purchasers of their product -- a "vaporizer" attached to

inhalation machines used by hospital anesthesia departments -- exceeded the solicitation of orders. *Id.* at *3. BOC personnel "engaged in training medical personnel," "furnishing the students with 'care' packages" and "arrang[ing] for various guest lecturers at these training sessions." *Id.* at *1. Though such training did "serve[] to create goodwill and advertise Plaintiff's product," the court concluded that the training was not ancillary to sales because there was "good reason to get that [training] done whether or not the company has a sales force." *Id.* at 2. The court stated that P.L. 86-272 does not protect "technically trained . . . persons who perform a multitude of tasks" just because one of those tasks happens to be "sales." *Id.*; *see also Brown Group Retail v. Franchise Tax Board*, 52 Cal. Rep. 202, 210-11 (Cal. App. 1996)(advice on operations of retail stores exceeded solicitation of orders); *Kelly-Springfield Tire Company v. Bajorski*, 635 A.2d 771 (Conn. 1993)(visits by credit managers exceeded solicitation of orders because "[l]ike repairs and servicing, proper credit practices to monitor the collectibility of payments due from dealers . . . are not themselves ancillary to 'requests for purchases'").

Likewise, even before *Wrigley*, state courts had held that certain forms of technical assistance or advice forfeited immunity under P.L. 86-272. *See Clairol, Inc. v. Kingsley*, *supra*; *Briggs & Stratton Corp. v. State Tax Comm'n*, 3 Or. Tax 174, 1968 WL 207; *Miles Laboratories, Inc. v. Dep't of Revenue*, 546 P.2d 1081, 1083 (Or. 1976) (handling customer complaints); *Iron Fireman Manufacturing Co. v. State Tax Commissioner*, 445 P.2d 126, 128 (Or. 1968)("almost constant interchange and pooling of talents, resources and expertise in the engineering, manufacturing, installation, and testing of parts furnished by taxpayer"); *Indiana Dep't of State Revenue v. Continental Steel Corp.*, 399 N.E.2d 754, 759 (Ind. Ct. App.

1980)(handling customer complaints); *National Tires, Inc. v. Lindley*, 426 N.E.2d 793, 795, 798 (Ohio App. 1980)(inventory management and control services); *Hervey v. AMF Beaird, Inc.*, 464 S.W.2d 557 (Ark. 1971)(same). While some of these pre-*Wrigley* cases might have applied a test different from *Wrigley*, *Wrigley's* discussion of *Clairol* makes clear that both before and after *Wrigley*, even modest technical assistance is enough to forfeit immunity under P.L. 86-272. In sum, there is no basis for a claim that the decision below is inconsistent with the decisions of other state courts.

Finally, the Court should not grant the petition on the basis of Kennametal's prediction that the decision below "will create confusion for other state and federal courts interpreting *Wrigley* in the future." Pet. 25. This prediction is undercut by Kennametal's own view that cases under P.L. 86-272 concerning technical assistance will continue to turn upon "the facts and circumstances of each case." Pet. 13. In addition, Kennametal's failure to allege a conflict in the lower courts suggests that *Wrigley* and its discussion of *Clairol* have established an adequate standard for past and future use by the lower courts. In any event, Kennametal's speculation about future conflicts in the lower courts does not support plenary review at this time. *See Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955)(conflict in lower courts will not justify review unless it is "*real* and embarrassing")(emphasis added)(citation omitted).

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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